

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
PETITION FOR
REHEARING
EN BANC**

ORIGINAL

77-1064

United States Court of Appeals

FOR THE SECOND CIRCUIT

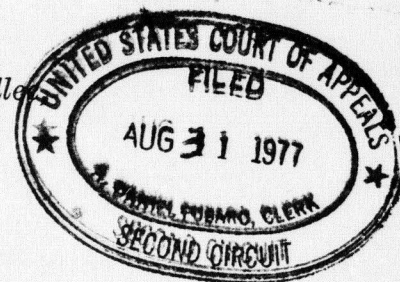
UNITED STATES OF AMERICA,

Appellee

against

JOHN McGRATH,

Defendant-Appellant.



On Appeal from Judgment of the United States District
Court for the Eastern District of New York

PETITION FOR REHEARING OR REHEARING
IN BANC

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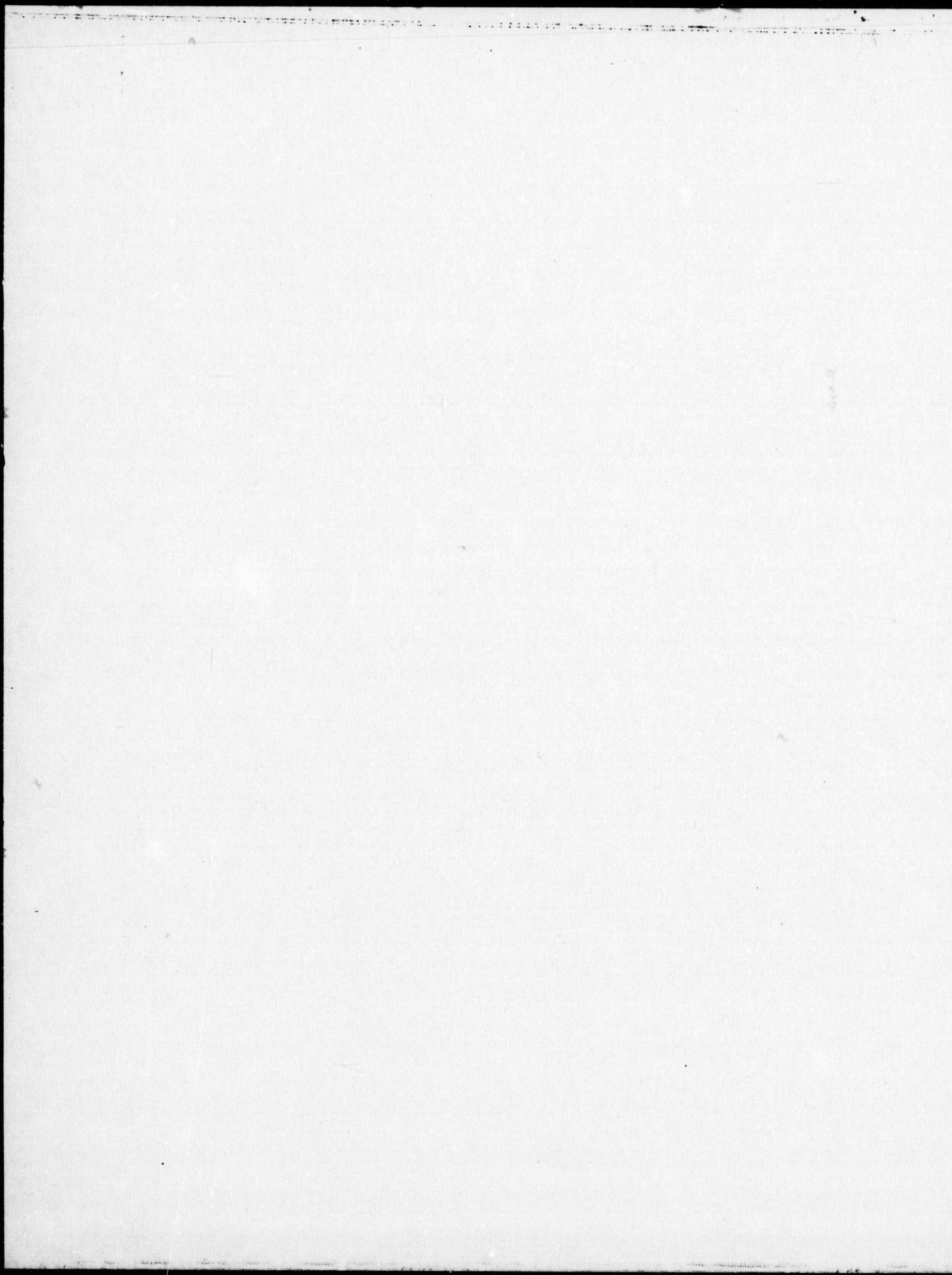


TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	4
ARGUMENT	8
(1) The Foley testimony did not have a sufficient foundation or basis of reliability for its admission	9
(2) The Foley hearsay testimony was wholly unrelated to the issues of the trial, did not constitute a "prior consistent statement", and provided the jury with bad char- acter evidence which was not "harmless in any event."	12
CONCLUSION	16

TABLE OF AUTHORITIES

	PAGE
CASES:	
FELICE v. LONG ISLAND RAILROAD COMPANY, 426 F.2d 192 (2d Cir.), cert. denied, 400 U.S. 820 (1970)	10
GRUNENTHAL v. LONG ISLAND RAILROAD COMPANY, 388 F.2d 480, 483 (2d Cir. 1968)	14
HARRINGTON v. CALIFORNIA, 395 U.S. 250, 254 (1969)	15
UNITED STATES v. IACONETTI, 406 F.Supp. 554, 558 (E.D.N.Y.) (Weinstein, J.), aff'd. on other grounds, 540 F.2d 574 (2d Cir. 1976), cert. denied, 45 U.S. L.W. 3463 (U.S. Jan. 10, 1977)	8

	PAGE
UNITED STATES v. LOMBARDI, 550 F.2d 827 (2d Cir. 1977)	8
UNITED STATES v. ZITO, 467 F.2d 1401, 1404 (2d Cir. 1972)	8
TREATISE:	
4 Weinstein's Evidence ¶801 (d)(1)(B)(01)	9
STATUTE:	
Federal Rule of Evidence 801 (d)(1)(B)	9

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1064

UNITED STATES OF AMERICA,

Appellee,

- against -

JOHN McGRATH,

Appellant.

PETITION FOR REHEARING OR REHEARING IN BANC

PRELIMINARY STATEMENT

The appellant, John McGrath, hereby petitions for a rehearing or rehearing in banc of a decision dated July 19, 1977 which affirmed appellant's conviction following a jury trial in the United States District Court for the Eastern District of New York. Appellant was convicted of three violations of the Hobbs Act, 18 U.S.C. §1951; five counts of tax evasion, 26 U.S.C. §7201; and five counts of filing false and fraudulent tax returns, 26 U.S.C. §7206.

The decision was rendered by two judges of this Court, Circuit Judges J. Edward Lumbard and Thomas J. Meskill. The

third member of the panel, Associate Justice Tom C. Clark, died on June 13, 1977, following oral argument of the appeal and prior to the decision.

The petition for rehearing is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure because, in our opinion, the Court's decision has overlooked and misapprehended the factual and legal basis of appellant's contention on appeal. The petition for rehearing in banc is filed pursuant to Rule 35(a) of the Federal Rules of Appellate Procedure because, in our opinion, (1) consideration by the full Court is necessary to secure or maintain uniformity of its decision, and (2) the decision involves a question of exceptional importance to the administration of federal criminal trials.

In our view, the Court's decision endorsing the admission of "Foley's Hearsay Testimony" constitutes an extraordinary and unprecedented departure from the traditional rules of evidence, and prior decisions of this Court.* As we will hereafter seek to demonstrate, the hearsay evidence branded appellant before the

* Although appellant's petition is focused on the hearsay testimony endorsed by the Court's decision, appellant nonetheless respectfully disagrees with the Court's holding endorsing the "Amended Indictment" obtained by the Government during the course of the trial, and the failure of the trial court to so advise the jury. We respectfully refer the Court to appellant's briefs due to the space limitation imposed on petitions for rehearing.

jury as a corrupt public servant. The jury did not reach a guilty verdict until more than four days of deliberations had elapsed, during which it twice reported to the Court that it was "dead-locked" and thereafter had to receive an Allen-type charge.

To permit the decision to stand uncorrected will, in our view, invite and encourage the receipt of prejudicial evidence into criminal trials which defendants cannot adequately challenge or defend. The decision will contribute to a proliferation of litigation on collateral issues during criminal trials concerning what prior statements a prosecution witness may have said out of court. Other witnesses, under the Court's decision, can be called to attest to this issue even though the alleged prior consistent statement had not been the subject of the prosecution witness' testimony, had no bearing or relevancy to any allegation or transaction on trial, and had the necessary effect of advising the jury that the defendant was a corrupt public servant willing to accept a \$10,000 bribe. All of these factors, we submit, provide compelling reasons for this Court to reconsider its decision and grant appellant a rehearing or rehearing in banc.

STATEMENT OF THE CASE

Appellant had been charged in Five Counts of the indictment with extorting payments from five tow-truck operators while appellant served as Park Maintenance Supervisor for the Long Island State Parks Commission. One of the five tow-truck operators was Victor LaGuardia who was called as a prosecution witness at trial.

On direct examination, LaGuardia testified about his dealings with appellant to obtain an exclusive franchise permitting him to tow disabled cars from certain sections of the Long Island parkways. LaGuardia testified that he made several cash payments to appellant from 1968 through 1973, totalling \$10,500.

On cross-examination, defense counsel elicited the fact that during the Grand Jury investigation, LaGuardia had denied under oath making any such payments, or statements concerning such payments to appellant. For these answers, LaGuardia had been indicted by the Grand Jury for perjury. The perjury indictment was subsequently dismissed upon LaGuardia's agreement to testify against appellant.

Nowhere on direct, cross or redirect examination of LaGuardia was any question or answer ever elicited concerning one Joseph Foley. Foley was an acquaintance of LaGuardia who in 1972

had also been interested in obtaining parkway employment. Before the Grand Jury, Foley testified that LaGuardia had advised him in a barroom meeting that this could probably be arranged, but that a \$10,000 bribe for appellant would be necessary. Appellant was not present at this meeting, and had no knowledge of it. Neither LaGuardia nor Foley did anything in furtherance of this conversation.* (158a-166a)

Following LaGuardia's appearance at the trial, the Government advised appellant's counsel that it had intended to call Foley as a witness the following day, and furnished counsel with a transcript of Foley's Grand Jury testimony. The next morning, appellant's counsel promptly registered his objection to the proffered testimony.** The Court heard extensive argument, and declared a recess during which it read the Foley Grand Jury testimony. The Court adopted the Government's suggestion and permitted Foley to testify to his barroom conversation with LaGuardia under Federal Rule of Evidence 801 (d)(1)(B), as a prior consistent statement offered to rebut a charge of recent fabrication. Foley testified in conformance with his Grand Jury appearance. (134a-165a)

* Before the Grand Jury, LaGuardia repeatedly denied making any such statement to Foley.

** The Court's opinion quite inaccurately implies that appellant did not object at the trial. It states: "McGrath now claims that Foley's testimony was not relevant to any of the issues at trial, and was so prejudicial and inflammatory as to deny him a fair trial." (Emphasis supplied)

Twice during its summation to the jury, the Government relied upon Foley's testimony in urging appellant's conviction. In addition to arguing LaGuardia's credibility, the prosecution contended that the LaGuardia perjury indictment had been the turning point in the Government's investigation of appellant. Once LaGuardia had been indicted for his alleged false denials of wrongdoing, all five tow-truck operators, including LaGuardia, decided to cooperate with the Government and truthfully testify against appellant.* One of the principle reasons for this successful breakthrough in the investigation, the prosecutor argued, was the Grand Jury testimony of Joseph Foley: "LaGuardia could only be indicted for conversations with other people like Joe Foley. He told Foley in order to get the parkway, you have to pay, words to that effect...the way to get on the parkway is to pay McGrath." (2550-54) The prosecutor emphasized the reliability and credibility of Foley (2553-54):

Foley is not a person that had anything against McGrath...I think the testimony was that (he) didn't even know McGrath and McGrath himself said he doesn't know Foley. So why is Foley making this up?

Again in its "rebuttal" summation, the prosecutor relied upon Foley's testimony in repeating to the jury his theme that

* There was evidence that the tow-truck operators held a meeting with LaGuardia, following his indictment, to discuss changing their testimony to implicate appellant. (603-04, 1751-52)

the LaGuardia indictment represented the breakthrough in the investigation of appellant. The prosecutor also used the Foley testimony to demean the defense summation as a diversionary tactic designed to distract the jury's attention from the truthfulness of the Government's allegation. (2653-54)

Jury deliberations started in the late afternoon of November 10, 1976. (2744-46) On November 11, 1976, at 4:40 P.M., the Court received a note from the jury: "Your Honor, we are in a deadlock concerning the extortion counts. May we please have further instructions as to what to do". (2762) The Court recharged on Counts Eleven through Fifteen as originally charged. (2764-2775) On November 12, 1976, at 6:10 P.M., the jury sent another note: "We have concluded that we cannot reach a unanimous decision on counts 11 through 15. Please instruct us, your Honor, as to the other counts". The following colloquy then ensued (2795):

"THE COURT: Now, without telling me. I don't want to know what you, whether you've reached a decision on, what your decision is, I definitely don't want to know what your decision is as to counts 1 through 10; do you have a decision on counts 1 through 10?

FOREMAN: No.

THE COURT: You don't?

FOREMAN: No." (2809-2810)

On November 15, 1976, at 10:40 A.M., the Court, over defendant's objection, and denying a motion for mis-trial, gave an Allen-type charge. The jury rendered its verdict at 4:40 P.M.

ARGUMENT

Appellant contends that the Court's decision of July 19, 1977, endorsing the admission of Foley's hearsay testimony, was clearly erroneous and misapprehended the factual and legal basis of appellant's contention that he was prejudiced by its admission. The prior decisions cited in the Court's opinion do not provide support for the admission of Foley's testimony. To the contrary, the holdings provided adequate bases and reasons for rejecting the admission of such testimony.* Appellant further contends that the Court misapprehended the basis for its conclusion that "beyond a reasonable doubt...there could have been no improper prejudice from the admission of Foley's testimony." The reasons for the foregoing contentions are as follows:

* UNITED STATES v. LOMBARDI, 550 F.2d 827 (2d Cir. 1977); UNITED STATES v. ZITO, 467 F.2d 1401, 1404 (2d Cir. 1972); UNITED STATES v. IACONETTI, 406 F.Supp. 554, 558 (E.D.N.Y.) (Weinstein, J.), aff'd. on other grounds, 540 F.2d 574 (2d Cir. 1976), cert. denied, 45 U.S. L.W. 3463 (U.S. Jan. 10, 1977).

(1) The Foley testimony did not have a sufficient foundation or basis of reliability for its admission.

One of the principle concerns before admitting prior consistent statements is that they were, in fact, made by the declarant. See 4 Weinstein's Evidence ¶801 (d)(1)(B)(01). In the IACONETTI case cited in the Court's opinion, Judge Weinstein allowed the Government witness to testify to a prior consistent statement allegedly made by another prosecution witness, under Federal Rule of Evidence 801 (d)(1)(B). Before admitting the testimony, Judge Weinstein found that the prior statement had sufficient indicia of reliability because it was testified to at trial by the prosecution witness who was the declarant of the out-of-court statement. See 406 F.Supp. at page 558. This same requirement was met in the other two decisions relied upon by this Court. See UNITED STATES v. LOMBARDI, supra, (witness Yuin testified on cross-examination and redirect concerning the out-of-court statement), and UNITED STATES v. ZITO, supra, (witness Doran testified on direct examination concerning the out-of-court statements).

In the instant case, however, the witness LaGuardia gave no testimony whatever concerning the out-of-court statement to Foley, either on direct, cross or redirect examination. The Government made no effort at all to elicit this alleged prior statement

from LaGuardia, the purported declarant.* Whether LaGuardia would have confirmed having made such statements to Foley cannot be ascertained from the record because LaGuardia had previously denied making such statements to Foley when questioned before the Grand Jury.

Thus, there was no foundation for admitting the Foley testimony, and there existed a substantial doubt as to whether LaGuardia had, in fact, made the statements to Foley. If on re-direct examination, LaGuardia had either denied or failed to recall making such statements to Foley, there would have been no basis whatever for admitting Foley's testimony.

In *FELICE v. LONG ISLAND RAILROAD COMPANY*,** 426 F.2d 192 (2d Cir.), cert. denied, 400 U.S. 820 (1970), this Court refused to endorse the admission of a prior consistent statement where no adequate foundation has been established. There, the witness, Dr. Lipton, could not recall the circumstances under which the alleged prior consistent statement had been made to him, and the Court held it was improper to admit his testimony concerning it.

* We can only assume that the Government deliberately chose not to elicit such testimony on redirect examination as part of its strategy to justify the calling of Joseph Foley in its direct case. (652-667)

** The *FELICE* opinion was written by Circuit Judge Henry J. Friendly, with the concurrence of Circuit Judges J. Edward Lumbard and Walter R. Mansfield.

Here, there was no foundation at all established through the declarant, LaGuardia. The Government deliberately chose not to ask LaGuardia whether he had made such statements to Foley. The appellant was thereby deprived of the opportunity of confronting LaGuardia about the Foley meeting. Appellant had no reason to question LaGuardia about the Foley incident because it was not a subject of the trial or LaGuardia's testimony. For all we know, LaGuardia may have admitted making the statement, but that it was a fraudulent effort to obtain money from Foley.

Nor could appellant's counsel cross-examine Foley to ascertain the truthfulness or accuracy of LaGuardia's out-of-court statement. Foley never met appellant. It is no answer to say that appellant could have recalled LaGuardia as a witness during the trial to satisfy this requirement. Such procedure would have only compounded the prejudice because had LaGuardia confirmed the out-of-court statement, the jury would have heard evidence for a second time that appellant was a public servant available and willing to accept a \$10,000 bribe from Foley.

The vice and inherent danger of admitting such evidence without foundation is particularly acute in this case because the record shows that, (a) appellant was not present when the alleged statement was made about him in the barroom meeting, (b) appellant had no knowledge of the conversation, and (c) appellant had never

discussed or done anything in connection with this matter. For these reasons, we submit that it was clearly erroneous for the Court to endorse the admission of such testimony.

2. The Foley hearsay testimony was wholly unrelated to the issues of the trial, did not constitute a "prior consistent statement", and provided the jury with bad character evidence which was not "harmless in any event."

The Court's opinion rejected appellant's contention that the Foley testimony was not relevant to any of the issues at trial, and relied upon three decisions authorizing the admission of prior consistent statements offered to rebut a charge of recent fabrication. This holding, we submit, is clearly erroneous for the Court misapprehended the factual distinction between appellant's case, and those found in the three cases relied upon by the Court.

A review of the decisions relied upon by the Court shows that in each instance the hearsay evidence related directly to the prosecution witness' version of the transactions which were the subject of the trial. In LOMBARDI, the out-of-court statement related to the prosecution witness' version of a narcotics transaction. In ZITO, the out-of-court statement related to the prosecution witness' version of extortionate transactions. In IACONETTI, the out-of-court statement related to the prosecution

witness' version of a bribery transaction. All of the foregoing transactions were the subject of the indictment.

In the instant case, however, the Foley conversation was not a subject matter of the indictment. Indeed, it was not even a subject matter of LaGuardia's testimony!

In our opinion, this holding marks an unprecedented and extraordinary departure from the traditional rule allowing the use of prior consistent statements as hearsay evidence in a trial. This is because it allows testimony to be admitted unrelated to the witness' version of the events, and of a highly prejudicial nature. We can appreciate circumstances where the prior consistent statements related and bore directly on a jury's evaluation of the witness' version of an event at the trial. Such was true in the IACONETTI, LOMBARDI and ZITO cases. But, here the Court's holding expands the scope and definition of "prior consistent statement" to include statements made by a prosecution witness about a defendant, even though unrelated to the witness' version of events at the trial.

The Court's holding opens the door to prosecutors who wish to call non-accomplice witnesses for the purpose of giving hearsay evidence incriminating the defendant. Here, the prosecutor was allowed to argue the credibility of Foley to the jury as a witness who had no improper motive to implicate the defendant.

Based upon Foley's testimony, the prosecutor told the jury: "...the way to get on the parkway is to pay McGrath." (2553) Appellant could not challenge this evidence because he was not present and had no knowledge that LaGuardia may have said these things about him. The inescapable implication created was that appellant was a corrupt official ready and willing to accept a \$10,000 bribe from Foley. Such ominous result should not be countenanced by this Court. This clearly is a case where the "basic facts would be buried in the confusion by the admission of an alleged prior consistent statement caused by the trial of collateral issues." GRUNENTHAL v. LONG ISLAND RAILROAD COMPANY,* 388 F.2d 480, 483 (2d Cir. 1968).

We respectfully submit that the Court misapprehended the circumstances under which this evidence was admitted, and that the Court's conclusion that the admission was "harmless in any event" is clearly erroneous. The Court reached this conclusion by referring to the fact that appellant was acquitted on the LaGuardia count. The Foley hearsay testimony did not, in fact, relate to the credibility of LaGuardia or his version of the events at trial. It simply branded appellant as a known corrupt public official. We

* The GRUNENTHAL opinion was written by Circuit Judge Harold Medina, with the concurrence of Circuit Judges J. Edward Lumbard and Paul R. Hays.

submit that it cannot be said, beyond a reasonable doubt, that this evidence was rejected by the jury. This is because it had the necessary effect of tarring the appellant in the eyes of the jury when all the evidence was evaluated. A juror could have accepted Foley's testimony about the barroom meeting, and still have rejected LaGuardia's version of his dealings with appellant. We submit that the acquittal lends no support for the Court's conclusion.

Nor do we agree with the Court's conclusion that the possibility of prejudice was "negligible." We submit that this observation overlooks three critical facts revealed by the record. First, the jury confessed on two occasions during its more than four days of deliberations that it was "deadlocked" and had to receive an Allen-type charge. This was not a case of "overwhelming evidence" of guilt. One juror could have been swayed by Foley's testimony to break the "deadlock." We submit that it is a dangerous application of the harmless error doctrine to assume that this did not occur in view of the extensive and stalemate deliberations shown by this record. See HARRINGTON v. CALIFORNIA 395 U.S. 250, 254 (1969). Secondly, twice during its summation to the jury, the Government relied upon Foley's testimony as significant evidence in urging appellant's conviction on all counts. And, thirdly, the transcript shows that the Government spared no effort to

persuade the trial judge to admit Foley's testimony because it was considered essential to its case. When the appellant objected, the Government argued strenuously and at length for its admission citing cases to the Court and appellant's counsel. Under these circumstances, we submit that the Court did not fully apprehend the factual setting of the trial where this evidence was admitted and used by the Government against appellant. For these reasons, we respectfully request a rehearing or rehearing in banc.

CONCLUSION

THE PETITION FOR REHEARING
OR REHEARING IN BANC
SHOULD BE GRANTED.

Dated: August 10, 1977
Mineola, New York

Respectfully submitted,

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Attorney for

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